

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE

MICHAEL J. ASHE, JR., Sheriff of Hampden County,
HARRY E. CLUTE, Sheriff of Nantucket County,
JOHN F. DeMELLO, Sheriff of Barnstable County,
JOHN M. FLYNN, Sheriff of Worcester County,
PETER Y. FLYNN, Sheriff of Plymouth County,
ROBERT J. GARVEY, Sheriff of Hampshire County,
CHRISTOPHER S. LOOK, JR., Sheriff of Dukes County,
CLIFFORD H. MARSHALL, Sheriff of Norfolk County,
CARMEN C. MASSIMIANO, JR., Sheriff of Berkshire County,
JOHN P. McGONIGLE, Sheriff of Middlesex County,
DONALD J. McQUADE, Sheriff of Franklin County,
DAVID R. NELSON, Sheriff of Bristol County,
CHARLES H. REARDON, Sheriff of Essex County,

Filed in Support of the Petitioner
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THE INTEREST OF THE MASSACHUSETTS SHERIFFS

This brief as amici curiae is submitted on behalf of the Sheriff of Hampden County, Michael J. Ashe, Jr., and the duly elected Massachusetts sheriffs from Middlesex County, John P. McGonigle, Norfolk County, Clifford H. Marshall, Worcester County, John M. Flynn, Franklin County, Donald J. McQuade, Barnstable County, John F. DeMello, Hampshire County, Robert J. Garvey, Berkshire County, Carmen C. Massimiano, Jr., Plymouth County, Peter Y. Flynn, Dukes County, Christopher S. Look, Jr., Bristol County, David R. Nelson, Essex County, Charles H. Reardon, and Nantucket County, Harry E. Clute ("Amici" or "Massachusetts sheriffs"). Amici represent thirteen of the fourteen counties which make up the Commonwealth of Massachusetts. This brief is offered in support of the petitioner, Robert C. Rufo, the sheriff from the remaining county in Massachusetts, Suffolk County, and is submitted with the filed written consent of the parties.

The Massachusetts sheriffs are acutely interested in the issues presented by this petition. The criminal justice system in Massachusetts consists of a comprehensive scheme of state prisons, and county jails and houses of correction. Convicted offenders serving felony sentences are incarcerated in a system of state prisons operated by the Commonwealth. Thirteen of the fourteen¹ Massachusetts counties operate jails for pretrial detainees and houses of correction for offenders serving misdemeanor sentences of two and a half years or less.

The Massachusetts sheriffs are directly affected by the District Court's order which compels single-cell occupancy in the Suffolk County Jail. The Massachusetts sheriffs have held Suffolk County pretrial detainees in their own county facilities

¹ Nantucket County has no jail or house of correction. Detainees and misdemeanor offenders from Nantucket are incarcerated in the Barnstable Jail and House of Correction.

on a voluntary basis as one means to assist Sheriff Rufo in complying with the District Court's order (First Circuit Appendix ("FCA") 296-297). Initially, inmates from Suffolk County were transferred to counties adjacent to or near Suffolk County, namely Essex, Hampden, Middlesex, Norfolk and Worcester Counties. Those counties, however, became subject to prison population orders imposed by federal or state courts and, as a result, Sheriff Rufo began transferring pretrial detainees to more distant counties in western Massachusetts. Although the District Court's order prohibited Sheriff Rufo from double-celling Suffolk County detainees, the transferred pretrial detainees were in many instances double and triple-celled by the Massachusetts sheriffs who voluntarily accepted the transferees into their facilities.

Even if the Massachusetts sheriffs were not directly affected by the District Court's single occupancy order, they share the concerns of Sheriff Rufo as prison administrators. Massachusetts, like most states, remains in the throes of the prison population crisis. Five of the Massachusetts sheriffs who join in this brief are operating their facilities under prison population orders.²

The Massachusetts sheriffs are obligated by state law to incarcerate pretrial detainees and sentenced offenders remanded to their custody by the state courts. On the other hand, they risk contempt of court charges if they fail to abide by prison population court orders. When a new prison is planned and constructed, the administrators make their best judgment

² Those counties, other than Suffolk, whose jails and houses of correction are subject to population orders are Hampden [*Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.)], Worcester [*Perry v. Fair*, C.A. No. 89-40031-XX (D.Mass.)], Essex [*Tucker v. Reardon*, C.A. No. 87-0110-S (D.Mass.)], Norfolk [*Libby v. Marshall*, C.A. No. 83-2281-S (D.Mass.)], and Middlesex [*Doyle v. McGonigle*, C.A. No. 89-1519 (D.Mass.)]. Four of the orders mandate early release of sentenced offenders in order to comply with population limitation provisions. Under these orders, there have been 7,153 prisoners released prematurely (see Addendum A to the Brief).

as to the needs of the criminal justice system in the community. The same judgment is called for when a prison administrator decides to enter into a consent decree as a means of terminating litigation. When the future needs of a community's criminal justice system are either unforeseeable, or inaccurately predicted, flexibility is required in the administration of consent decrees governing local prisons if the public interest is to be served. In order to serve the public interest, double-celling is, or has been, utilized to some extent in all of the counties, except where prohibited by court order.³

It is thus apparent that the Massachusetts sheriffs who are administrators of county jails and houses of correction are vitally interested in the issues involved in this case. The Massachusetts sheriffs who are now not operating under consent decrees, but who may face the decision of entering into such a decree given the worsening prison population crisis, have an interest in the standards under which modification requests will be judged. As parties or potential parties to consent decrees, the Massachusetts sheriffs become more than parties to a contract. They remain elected guardians of the public interest. If it can be demonstrated that a consent decree, because of unforeseeable circumstances or factors beyond anyone's control, no longer strikes an appropriate balance between the interest of public safety and the interest in preserving prisoners' rights, a flexible approach should be applied to requests for

³ Court orders presently prohibit double-celling in the Middlesex County Jail and the Worcester County Jail and House of Correction.

In the respondents' brief in opposition to Sheriff Rufo's petition for certiorari, respondents inaccurately represented that amicus Ashe had entered into a consent decree mandating single cell occupancy for the Hampden County Jail and House of Correction (Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 24, n. 11). On the contrary, the decision of the court in *Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.), recognized and accepted amicus' practice of double-celling when necessary. The consent decree referred to by respondents dated July 26, 1990 does not prohibit double or triple bunking, but rather, restricts it to tiers of cells located on the ground floor of the cell block.

modifications. The District Court's refusal to consider the public safety interest, and its application of contractual principles to Sheriff Rufo's request for modification are fatal flaws in its decision denying the modification.

This brief urges the rejection of the "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), to requests to modify consent decrees governing jails and prisons, and urges the adoption of the "flexible standard" discussed by the majority of the Circuit Courts of Appeals. The District Court denied Sheriff Rufo's requested modification on the grounds that it would violate "agreed-upon standards". (Sheriff's Cert. Pet. at 12a). The District Court applied contractual principles to Sheriff Rufo's request, which is a standard even more strict than the "grievous wrong" standard enunciated in *Swift*, and its approach should be rejected by this Court.

SUMMARY OF ARGUMENT

This case presents issues which directly impact the public interest in incarcerating pretrial and sentenced offenders who have been remanded by the courts to the custody of prison administrators. Massachusetts, despite recent prison construction, still faces a shortage of prison beds, in part, because of unforeseen increases in pretrial detainee and sentenced offender populations.

Amici, the sheriffs from Massachusetts, share the problems in prison administration experienced by the petitioner, Sheriff Rufo of Suffolk County. The practice of double-ceiling is prevalent in all but one Massachusetts county, and five amici are operating their institutions under court population orders.

The application of a strict "grievous wrong" standard enunciated in *United States v. Swift*, 286 U.S. 106, 115 (1932), to institutional reform consent decrees, fails to adequately take

into account the public safety interest which may be threatened by unforeseen changes in local criminal justice systems. Inmate population projections relied on when new facilities are planned, and prevalent when administrators decide to enter into consent decrees have been proved inaccurate, and the public interest has suffered as a result.

The District Court applied contractual principles to Sheriff Rufo's modification request, rejecting it because, in the District Court's view, "agreed-upon standards" would be violated by the modification. This approach was contrary, not only to the "flexible approach" discussed by several courts in institutional reform consent decrees, but also to *United States v. Swift*, 286 U.S. 106, 115 (1932), which characterized a consent decree as "a judicial act" rather than a contract between private parties.

The Massachusetts Sheriffs urge the Supreme Court to adopt the flexible approach to consent decree modification requests proposed by Sheriff Rufo. A flexible standard allows for the protection of the public interest which becomes threatened when prison populations exceed expectations, while still preserving the essence of the prison consent decrees which is to maintain current constitutional standards for pretrial detainees and sentenced offenders.

ARGUMENT

I. The Public Interest at Stake — Despite Recent Prison Construction in Massachusetts, Its Sheriffs Continue to Face a Shortage of Prison Beds.

New county jails and houses of correction have been completed, or in the process of construction, in the Massachusetts counties of Suffolk, Essex, Worcester, Norfolk, and Hampden. Regrettably, past projections about prison population in all of

the Massachusetts counties have proved to be inaccurate. As a result, even those sheriffs with new facilities still deal with fewer cells than prisoners remanded to their custody. A profile of each sheriff's situation illustrates the compelling public safety interest at stake.

(1) Hampden County

Amicus, Michael J. Ashe, Jr., Sheriff of Hampden County, has endured perhaps the worst population crisis in any of the Massachusetts counties. With a rated capacity of 302 inmates, the Hampden County Jail and House of Correction held 724 inmates on October 24, 1988 (FCA 439). On that day, amicus entered into a consent order which capped the population at 500 inmates, with a subcap of 370 sentenced offenders and 130 pretrial detainees. Under the order, amicus was directed to grant early release credits in order to maintain the 370 inmate cap on the sentenced population, and was ordered to refuse admission of any pretrial detainee whose presence resulted in a violation of the 130 inmate cap on the pretrial population (FCA 440-444). The consent order was based upon the parties' best estimates as to the relative need for sentenced and pretrial beds. The consent order subcap of 130 pretrial beds soon proved to be totally unworkable. Amicus moved the District Court to modify the consent order, offering evidence that a minimum of 200 pretrial beds were needed by the state court judges sitting in Hampden County. The plaintiff class of inmates opposed the requested modification claiming that there had been no change in circumstances. The District Court took evidence, not only from the parties, but from the Chief Justice of the State Superior Court, which court was responsible for remanding pretrial detainees to amicus' custody. On February 21, 1989, the District Court granted amicus' requested modification and increased the pretrial population cap to 200 (FCA 453-454). Amicus' modification was granted, in part, because

the evidence generated by the experience of operating under the consent decree was "obviously not available at the time the original order was entered", and because the court had the benefit of the evidence offered by the state judiciary, which, although not a party, was directly affected by the consent decree (FCA 449).

Amicus' experience presents an excellent example of the need for a flexible approach toward motions to modify consent decrees. Amicus' request to modify the consent decree to increase the pretrial population cap was justified, first, because the parties' good faith predictions as to the required number of pretrial beds simply proved inaccurate. Secondly, the District Court found that the change had "minimal, if any, constitutional significance" (FCA 448). The District Court considering amicus' request for modification acknowledged that the practice of double-celling would continue under the consent decree as modified⁴ (FCA 448). Amicus will continue to operate under the February 21, 1989 modification of the consent order until construction is completed for the new Hampden County Jail and House of Correction in Ludlow, Massachusetts. Regrettably and unavoidably, during the pendency of the court's population order, amicus has been forced to release 3,556 inmates who have completed one-third or less of their imposed sentences.⁵

⁴The plaintiffs and amici did agree to restrict double-celling to the floor level tier cells on July 26, 1990. *Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.).

⁵On February 16, 1990, amicus took unprecedented action to reduce the number of early releases when he occupied a National Guard Armory in Springfield, Massachusetts for use as a prison for sentenced offenders. Amicus' action provided sorely needed prison space in Hampden County, and also served to focus wide-spread attention on the problem of prison overcrowding. (See *Sheriff of Hampden County v. Secretary of Public Safety*, Hampden County Superior Court, C.A. No. 90-334; Time Magazine, Mar. 5, 1990, pp. 18-19.)

(2) Barnstable County

The Barnstable County Jail and House of Correction is not operating under any court population order. The facility contains 40 cells measuring 6.5' x 8', all of which are used for double-celling. The inmates spend an average of 8 hours per day out of their cells. The average population of the facility is 152, which includes the double-celled inmates. In 1989, in order to assist the petitioner Sheriff Rufo to comply with the District Court's single-cell occupancy order, Barnstable housed an average of 4 Suffolk County pretrial detainees in double-cells during a 45 day period. The Barnstable facility also houses pretrial detainees and misdemeanor offenders from Nantucket County which has no jail or house of correction (FCA 798-800).

(3) Berkshire County

The Berkshire County Jail and House of Correction is not operating under a court population order. The facility contains 113 cells which measure 6' x 8', 30 of which are used for double-celling. The average population of the facility is 160 inmates who spend an average of 11 hours per day out of their cells. During the same 45 day period in 1989, the Berkshire facility held an average of 8 Suffolk County pretrial detainees in double-cells in order to assist Sheriff Rufo to comply with the District Court's single-cell occupancy order (FCA 801-803).

(4) Bristol County

The Bristol County Jail and House of Correction is not operating under a court population order. The facility contains 236 cells which measure 7' x 7' which are used for double-celling an average jail inmate population of 420 inmates. The inmates here spend a total of 5½ hours per day out of their cells. During the same 45 day period in 1989, the Bristol facility

housed an average of 13 pretrial detainees from Suffolk County in double-cells in order to assist Sheriff Rufo to comply with the District Court's single-cell occupancy order (FCA 804-805).

(5) Essex County

A new Essex County Jail and House of Correction was completed in 1990 with an inmate capacity of 500 inmates. The new facility is already at capacity and is not operating under a court population order. (The Sheriff anticipates the need for 110 double cells.) The old Essex Jail located in Salem, Massachusetts, operated under a court population cap of 162 inmates and contained 16 double-cells which were 70 square foot size (FCA 807-808).

(6) Plymouth County

The Plymouth County Jail and House of Correction is not operating under a court population order. The facility contains 140 cells which measure 6'6" x 7'6", all of which are used for double-celling inmates. The average population of the facility is 470 inmates. The inmates incarcerated in cells spend a total of 6 hours a day out of the cells. During the first 45 days of 1989, the Plymouth facility held an average 67 Suffolk County pretrial detainees in double-cells in order to assist Sheriff Rufo in complying with the District Court's single-cell occupancy order.

(7) Worcester County

The Worcester County Jail and House of Correction is operating under a court population order [*Perry v. Fair*, C.A. No. 89-40031-XX (D.Mass.)]. The average population of the facility is 641 inmates. The cells measure either 9' x 6'3" or 10' x 8', and 136 are used for double-celling. In 1989, the Worcester facility held an average of 8 Suffolk County pretrial detainees for 45 days in double-cells (FCA 118-119).

(8) Norfolk County

The Norfolk County Jail and House of Correction operates under a court population order [*Libby v. Marshall*, 653 F.Supp. 359 (D.Mass. 1986)], which caps the population at 200 inmates. Sheriff Marshall has released 1,034 inmates prematurely under the court order. A new Norfolk County Jail and House of Correction is under construction and is expected to be complete in 1992 (FCA 464-468).

(9) Franklin County

The Franklin County Jail and House of Correction is not operating under a court population order. The facility has 61 cells, 29 of which are used for double-celling. The cells are 48 square feet. During 1988 and 1989, the population surged from a low of 54 to a high of 89 (FCA 478-479).

(10) Dukes County

The Dukes County Jail and House of Correction is not operating under a court population order. The facility has 18 cells which contain 60 square feet, 6 of which are used for double-celling (FCA 485).

(11) Hampshire County

The Hampshire County Jail and House of Correction is not operating under a court population order. The facility was constructed in 1984, and has a rated capacity of 248. Among the living areas are 144 single occupancy cells. Although no cells are presently used for double-celling, during periods of overcrowding, inmates have been housed in medical rooms, holding cells, jail interview rooms, and visiting rooms (FCA 474-475).

(12) Middlesex County

The Middlesex County Jail (Cambridge) is operating under a court population order which limits the pretrial detainee

population at 200 and which prohibits double-celling. The Middlesex House of Correction (Billerica) has 218 cells measuring 49 square feet, 181 of which are used for double-celling (FCA 458-459, 814-815).

Amici submit that the threat of public safety in Massachusetts is starkly demonstrated by the shortage of prison beds faced by the Massachusetts sheriffs. The Court should adopt a flexible approach to consent decree modification requests which requires lower courts to give substantial weight to the public interest.

II. Amici Urge the Court to Reject the Stringent *Swift* Standard for Modification Requests in Institutional Reform Cases.

In *United States v. Swift*, 286 U.S. 106 (1932), the Supreme Court enunciated a standard to be applied to a consent decree modification proposed by a private party which had engaged in behavior harmful to the public interest. The harmful behavior in *Swift* was anticompetitive behavior violative of antitrust policy, and the Supreme Court concluded that the consent decree was "substantially impervious to change" because of the need to protect the public interest from such future behavior. *Swift*, 286 U.S. at 114. In this context, the Court applied a stringent standard to the private party seeking a modification, stating:

Nothing less than clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Swift, 286 U.S. at 119.

Notwithstanding the stringent "grievous wrong" standard applied to the private party seeking to modify the consent decree in *Swift*, the Supreme Court did not foreclose the development of a more flexible standard in appropriate cases. The *Swift* court drew a distinction between decrees such as the one before it, which gave protection to rights fully accrued upon facts so nearly permanent as to be "substantially impervious to change", and consent decrees which "involved the supervision of changing conduct or conditions and are thus provisional and tentative". *Swift*, 286 U.S. at 114 (emphasis supplied).

Consent decrees which govern prisons clearly fall into the latter category described by the *Swift* court, and amici urge the Court to enunciate and apply a more flexible standard to Sheriff Rufo's proposal for modification. The argument that a stringent standard should be applied to motions to modify consent decrees in "institutional reform litigation" is at odds with long standing precedent requiring federal courts to defer to the judgment of state and local elected officials, and skilled professionals, when determining the particular manner in which to administer a public institution consistent with individual constitutional rights. See *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (judicial deference to the judgments of experienced professionals is appropriate in administering complex institutions such as prisons); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979).

The District Court and the First Circuit failed to recognize that the consent decree governing the Suffolk County Jail regulated "changing conduct or conditions" and was "thus provisional and tentative". *Swift*, 286 U.S. at 114. While purporting to apply a more flexible standard to the Sheriff's request to modify, the District Court erroneously applied a stringent standard which failed to take into account the legitimate interests of the unrepresented public.

III. Amici Urge the Court to Reject the Particular Standard Applied by the District Court and the First Circuit Which Essentially Applied Contract Principles to the Petitioner's Request for Modification.

In *Swift*, the Supreme Court held that a consent decree was "a judicial act", and was unlike a contract whereby the parties might irrevocably abandon any right to seek modifications to adapt the decree to changed circumstances or conditions. *Swift*, 286 U.S. at 115.

While claiming to apply a "flexible standard", in reality, the District Court applied contractual principles to the Sheriff's request for modification. The District Court held that Sheriff Rufo's request failed to meet the legal requirements for modification because it would violate one of the primary purposes of the consent decree, which provided conditions of confinement for prisoners which "meet agreed-upon standards" (Sheriff's Cert. Pet. at 13a). The particular agreed upon standard identified by the District Court was single-cell occupancy. The District Court deemed it unnecessary to consider the interest of public safety as a factor in its decision (Sheriff's Cert. Pet. at 12a).

The District Court's logic was circular. In essence, it held that Sheriff Rufo could not seek to modify aspects of an agreed decree because the proposed modification would violate what the District Court felt was "agreed-upon" by the parties. The District Court's reasoning was in derogation of the principle that a consent decree must not be treated as a contract. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 660 (1961); *Duran v. Elrod*, 760 F.2d 756, 760 (7th Cir. 1985) (court may not rely on the "sanctity of contracts" in deciding whether to modify a consent decree governing a prison, but rather must consider the impact of the modification on the public interest); *New York State Association for Retarded Children v. Carey*,

706 F.2d 956, 971 (2d Cir. 1983) (defendants who operated a mental institution were not foreclosed from seeking changes in a consent decree based upon changed conditions).

By simply holding Sheriff Rufo to what the District Court considered to be the "agreed-upon standards" of his predecessor and the plaintiff class, the First Circuit departed from its own view as to the responsibility of courts in overseeing the implementation of consent decrees mandating institutional reform. *Massachusetts Association of Retarded Citizens v. King*, 668 F.2d 602 (1st Cir. 1981). In *King*, the First Circuit stated:

Programmatic decrees in public law litigation may call for somewhat more flexible interpretation in light of the need to achieve their basic purposes (the eradication of unconstitutional conditions) and the need to accommodate the differing competences of different branches of government as well as the differing needs and interests of the parties.

668 F.2d at 607-608.

By failing to consider the threat to public safety posed by the pretrial detainees who would be released as a result of the denial of Sheriff Rufo's requested modification, the District Court and the First Circuit refused to make any accommodation for the competences of other branches of government, and instead looked only to what it perceived that the parties had "agreed-upon".

By applying contractual principles to Sheriff Rufo's modification request, the courts below applied a standard even more stringent than the "grievous wrong" standard applied by the Supreme Court in *Swift* to a modification requested by a private party. *Swift*, 286 U.S. at 119.

IV. Amici Urge the Court to Adopt A Flexible Standard to be Applied to Requests to Modify Consent Decrees in Institutional Reform Litigation.

The critical distinction between consent decrees between private litigants and those involving elected and appointed public officials is that the latter directly involve the public interest. *Plyler v. Evatt*, 846 F.2d 208, 211 (4th Cir.), cert. denied, 488 U.S. 897 (1988). If the public interest is to be afforded appropriate weight by courts considering modification requests, a more flexible standard of review is required than that applied in *Swift*. That flexible standard, in the context of prison reform litigation, must balance the risks to the public against the threat to the constitutional rights of prisoners. *Heath v. DeCoursey*, 888 F.2d 1105, 1110 (6th Cir. 1989).

The Circuit Courts of Appeals have recognized that a consideration of the public interest requires a flexible approach to requests to modify consent decrees. The First Circuit has stated that the implementation of a consent decree, in certain circumstances, may require "the parties continually to reassess their respective rights and obligations under the decree as the circumstances . . . evolve". *Brewster v. Dukakis*, 675 F.2d 1, 5 (1st Cir. 1982) (change of circumstance was lack of funding). In *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981), an increase in prison population was deemed to be a sufficient change in circumstances to allow a consent decree to be modified to allow double-celling. A similar result was reached in *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988).

A public official who is party to a consent decree should be afforded an opportunity to fine-tune that decree when a change in circumstances calls for a rebalancing of the public interest and the individual rights at issue. *Heath v. DeCoursey*, 888 F.2d 1105 (6th Cir. 1989). Even if the public official

should have foreseen the change in circumstances, that factor will not bar a modification request if it is in the public interest. In *Heath*, the Sixth Circuit granted the defendant's request for a modification even though the defendant Sheriff knew or should have known that the agreed jail population limit was too low. 888 F.2d at 1107 n. 2.

A change or clarification in the applicable law governing public institutions has been held to warrant a modification of a consent decree. The Fourth and Eleventh Circuits have applied flexible standards to modification requests based upon clarification of constitutional standards regarding the administration of prisons. *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir.), cert. denied, 488 U.S. 897 (1988); *Nelson v. Collins*, 659 F.2d 420, 424-427 (4th Cir. 1981); *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984).

The District Court and the First Circuit failed to consider the clarification of prisoners' constitutional rights enunciated in *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Supreme Court held that the Constitution did not prohibit double-celling pretrial detainees. The District Court, however, erroneously held that even if Sheriff Rufo's proposed use of double-celling complied with constitutional standards, that factor did not "provide a basis for relief from a consent decree" (Sheriff's Cert. Pet. at 12a). That inflexible approach is at odds with *System Federation No. 91 v. Wright*, 364 U.S. 642, 660 (1961), where this Court permitted a modification of a consent decree based upon an amendment to the statute (the Railway Labor Act) which formed the basis of the consent decree. A court "must be free to modify the terms of a consent decree when a change in the law brings those terms in conflict with statutory objectives". *Wright* at 651; *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983) (applying the reasoning in *Wright* to a change in constitutional interpretation stating, "we can see no reason for a different

view when the requirement is constitutional and a subsequent decision of the court has made clear that the court entering the decree interpreted the requirement too broadly").

The District Court and the First Circuit's refusal to allow a clarification in constitutional interpretation to form the basis of a request to modify a consent decree is also at odds with the principle that a judicial remedy intended to eliminate an unconstitutional condition should not go beyond constitutional requirements. This principle was applied in *Oklahoma City v. Dowell*, ____ U.S. ___, 111 S.Ct. 630 (1991), where a request to dissolve an injunction entered in a school desegregation case was allowed because the unlawful conduct of the public officials had come to an end, and was unlikely to be resumed. See also *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (decree must be remedial so as to put those persons whose rights had been violated in the position they would have occupied had there been no violation). In *Milliken*, the Supreme Court noted that court imposed remedies exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, and that a court must take into account the interest of state and local governments in managing their own affairs. *Id.* at 282.

The District Court erred when it refused to even consider the evolution of constitutional law on the question of double-celling. The consent decree governing the Suffolk County Jail states the parties' desire to "fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees" (Sheriff's Cert. Pet. at 15a).

The decree itself nowhere mentions single-celling. The new Suffolk County Jail is one of the most modern facilities of its kind. Double-celling a limited number of pretrial detainees there will not create an unconstitutional condition in light of the Supreme Court's ruling in *Bell v. Wolfish*, *supra*.

The construction of a new Suffolk County Jail, which complies with constitutional standards, was the essence of the parties' consent decree. A factor considered by courts when passing on requests for modification is whether the requested change would defeat the fundamental purpose of the consent decree. *Carey*, 706 F.2d at 969 (modification granted because it was consistent with goal of closing a state run institution). *Plyler v. Evatt*, 846 F.2d at 212 (modification granted where prisoners would receive the "essence of their bargain" which was compliance with constitutional jail standards).

The "essence" of the bargain received by the pretrial detainees of Suffolk County was, as in *Plyler*, a jail which meets constitutional standards. The Sheriff has constructed a jail which contains space and amenities which are required by neither the Constitution nor the consent decree. The practice of double-celling is not prohibited by the language of the consent decree, nor is it prohibited by the Constitution. *Bell v. Wolfish*, 441 U.S. 520 (1979).

V. Amici Urge the Court to Grant the Petitioner's Requested Modification Under A Flexible Standard.

A consideration of the change in circumstances in Suffolk County, the clarifications in the constitutional standards for prison conditions, the public safety threat posed by releasing detainees committed to bail, and the essential purposes of this consent decree, require the granting of Sheriff Rufo's requested modification. The change in circumstances is a dramatic rise in the pretrial population in Suffolk County, beyond the number of cells constructed. A wooden adherence to a single occupancy requirement gives rise to a clear danger to public safety, since it will result in release on recognizance of persons who have been adjudicated as requiring bail. Releasing such individuals

defeats the legitimate public interest in ensuring that such individuals appear at trial.

Modifying the consent decree to provide for some amount of double-celling allows the Court to address this legitimate public interest, while at the same time adhering to the essence of the consent decree, which was to eliminate exposure of the inmate class "to unconstitutional conditions of pretrial confinement" (Sheriff's Cert. Pet. at 15a). Under a flexible standard, the modification requested by the Sheriff still provides the inmates with a fully constitutional jail, but also allows the Sheriff to serve the public interest by holding in his custody all pretrial detainees until they have appeared for trial, or have paid the bail which was set by the judicial branch of government.

CONCLUSION

The Massachusetts sheriffs urge that the decision below be reversed, and that the Court enter an order directing the allowance of the Sheriff of Suffolk County's motion to modify the consent decree.

Respectfully submitted,

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ADDENDUM A**MEMORANDUM TO THE NORFOLK COUNTY SHERIFF**

TO: Sheriff Clifford H. Marshall
 FROM: Deputy Supt. Peter Perrancello
 RE: Survey of County Facility Crowding Releases
 DATE: April 1, 1991

The following information illustrates the county releases (under federal and/or state court jurisdictions) that have been effected through 03/31/91.

<u>COUNTY</u>	<u>COURT CASE</u>	<u>FACILITY</u>	<u>METHOD OF RELEASE</u>	<u>RELEASE</u>
Hampden	Brown v. Ashe	Springfield York Street HOC & Jail	1. Sentence Credits Special Session Superior Court — day reporting	2806 3556
Middlesex	Richardson v. McGonigle	Cambridge Jail	1. Special Session Superior Court - halfway house - street - warrants	553 401 267 1221
Norfolk	Libby v. Marshall	Dedham HOC & Jail	1. Special Master Release Plan - sentenced - pretrial - monitors	610 101 323 1034
Worcester	Page v. Deignan	West Boylston Jail	1. Special Session Superior Court - releases	1101
Total Premature Releases Under Federal/State Court Orders				= 6912
				+ 241
				(Chas St) 7153